

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7096 8/10

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PHILLIP DOUGLAS MILLER, ESQ.,
PLAINTIFF

-AGAINST-

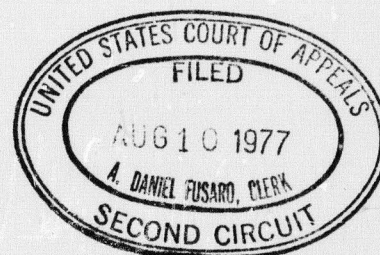
THE AMERICAN TELEPHONE TELEGRAPH CO.
("AT&T"), JOHN DEBUTTS, ROBERT FLINT,
DONALD LAMONT, CYRUS HALPERN, RODERICK
AYA, MESSRS. CHRISTENSON, ANDERSON,
GAMMON, WORTHY, AND CERTAIN OTHER
UNNAMED EMPLOYEES OF AT&T,
DEFENDANTS

U.S. DISTRICT COURT DOCKET
NO. 76 CIV 5462

U.S. COURT OF APPEALS
(2ND CIRCUIT)
DOCKET NO. 77-7096

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PLAINTIFF'S REPLY BRIEF



Phillip Douglas Miller, Esq., Attorney and Plaintiff Pro Se, hereby submits his Reply to the Brief of Defendants, as follows, which will deal only with clarification or correction of errors contained in Defendants Brief, in the order that they appear.

First, Plaintiff's Order to Show Cause, dated December 27, 1977, preceded Defendants Motion to Dismiss dated December 31, 1977. Defendants can state I "responded" to their Motion to Dismiss with my Order to Show Cause only because the Hon. J. Duffy held the Order to Show Cause in his office, without returning it or signing it, from December 27, 1976 to January 6, 1977. On January 6, 1977, Plaintiff was directed by the Hon. J. Duffy's law clerk, Mr. Kevin Castel, to take the papers to the Hon. J. Carter, who signed the papers without delay in the midst of a trial. (Page 1 of Defendants Appellate Brief, ["DAB"]).

Second, the Hon. J. Duffy allowed only one out of four federal statutory claims against Defendants, that under 42 U.S.C. 1981. All of my constitutional claims were rejected. All of my non-statutory, or common law, claims under the laws of New York, were allowed. Defendants claim that the latter will "preserve" my allegations of racial discrimination. This is impossible since racial discrimination is not an element of any of these legal claims, or causes of action. (Page 3 of DAB). The Congress saw fit, as did the legislatures of the various States, to pass numerous laws protecting against racial discrimination. These laws cannot be

* Thus, Defendants default in interposing a timely answer was countenanced by the District Judge with no showing of cause or excusable neglect required of them to justify the delay.

limited or denied application solely because of their number. Their multiplicity evidences the problem of enforcement, which is not helped by arbitrarily dismissing legal claims without proper regard for the allegations supporting them. (Page 4 of DAB).

Third, it is well settled that allegations contained in a Complaint are deemed true for purposes of a Motion to Dismiss. "Allegations" are therefore the controlling facts, just as if a trial judge or jury had made the same findings. In CBS, Inc. V. Springboard International Records 429 FS 563 (S.D., N.Y., 1976), the Court stated that the standard for dismissal of claims in a Complaint for failure to state a claim is whether it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Defendants statement of the facts, as far as they go, reasonably represent what took place. However, a more complete statement of facts would have included the additional fact that I repeatedly requested evaluation, but was never evaluated. In fact, they fired me before they would evaluate me. Defendants are therefore in no position whatsoever to allege that my performance was poor. Furthermore, "attitude", whether rich or poor, is not a basis for firing an employee. The Company rules and the Affirmative Action Plan were established to protect against such subjective, arbitrary, and racist standards of evaluation. (Page 5 OF DAB)

Defendants have also suggested that they made a good faith effort to resolve the matter but I was insistent on taking them to Court.

The "options" I was offered were as follows: immediately after I complained for the first time, Mr. Cyrus J. Halpern told me "he did not care" whether I transferred to the Legal Dept., elsewhere in the Company, or quit. This is more a threat than an offer to resolve an employee's claim of discrimination. At my request, I was advised how to transfer. I was then told I could seek to transfer, subject to an "available" opening, and I was never informed that any opening was available. Later on, I was offered another position within the Comptroller's Dept., which had nothing whatsoever to do with practicing law. After that, Mr. Donald Lamont, and this was not stated in my Complaint, offered a suggestion that I take a "Public Relations" job. None of these "options" showed any respect to the salary agreement I had with AT&T prior to coming there. (Page 5 of DAB).

Fourth, in arguing against Plaintiff's right to injunctive relief, Defendants completely avoid the required factual analysis. In the main, their arguments are beside the point, since the right to such relief is essentially a factual matter; the law being fairly settled. The following arguments are erroneous based on the facts as I alleged them. One, loss of income was not the basis upon which I sought injunctive relief. In fact, I alleged serious financial injury, in addition to injury to my business and reputation, and violations of my constitutional rights, and violations of federal and state laws. Furthermore, references to cases cited by me previously on this issue, show as a practical matter, Courts have granted injunctive relief solely on the basis of economic loss; the latter in effect

being the determinant of irreparable injury. It is anachronistic to say that financial injury is never irreparable injury. Columbia Pictures Industries, Inc. V. American Broadcasting Co., Inc. 501 F2d 894 (2nd Cir., 1974). There, the Court stated that the standard factors it now considers on a preliminary injunction are: clear likelihood of success on the available facts or sufficiently serious questions on the merits and the balance of equities tip decidedly in Plaintiff's favor. And two, Sampson V. Murray 415 U.S. 61 (1974) is clearly distinguishable, and does not control even for purposes of analogy. That case involved the correctness of an injunction actually ordered by the District Court while administrative procedures required by law had not yet been completed. Also, it does not involve racial discrimination; nor does it involve firing an employee in blatant violation of the Company's own rules. And three, Defendants argument that injunctive relief would not preserve the status quo, since I am no longer an employee, is unjust. Injunctive relief is an equitable remedy. It would be unfair to deny such relief to any employee merely because he has been fired. I took three months to seek relief because I respected the standards/^{governing} equitable relief and intended to seek relief only if I had to. And four, the standard that if an injunction will provide all or part of the relief requested, a clear showing of success on the merits must be made, is fully met. I have made the clear showing of success on the merits. Also, only if a contract of retainer were ordered would I receive all the relief I

requested. If I were reinstated, there would remain outstanding claims against the Defendants for substantial monetary damages. Since reinstatement can not grant all the requested relief, reinstatement can not be denied on the basis that it would give me all the requested relief.

Fifth, Defendants assert that NYCPLR 308(5) is the controlling statute on the procedure to use in serving process. Since I was not serving process in the State Courts, I did not refer to State Court procedure, which is inapplicable. FRCP 4(d) is the basis for my method of service. It authorizes appointment by law of a person to whom service can be made. Additionally, Defendants avoid the fact that Grammenos v. Lemos 457 F2d 1067 (2nd Cir., 1972), states that jurisdiction is not lost over Defendants where only one attempt at service was made, which may have been improper. There, the Court ruled:

The standards set in Rule 4(d) for service on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in cases in which the parties have received actual notice.

Sixth, Defendants misrepresent my allegations in their Brief discussing their position on my claims under the First, Fifth, and Fourteenth Amendments to the Constitution. They deny government action under the First and Fifth Amendments were alleged, because I failed to allege discrimination in hiring. Based upon the papers I have already submitted to this Court, all that needs to be said is that this is false. Furthermore, the requisite governmental

action is clearly evidenced by the Affirmative Action Plan of AT&T established pursuant to Court Order, and federal law. Additionally, in U.S. V. New Orleans Public Service, Inc. 553 F2d 459 (5th Cir., 1977), the Court held that E.O. 11246 creates a contractual obligation between the government and its contractors not to discriminate. The existence of this contract, whether express or implied in law, is sufficient basis for governmental action under the First and Fifth Amendments. With respect to the Fourteenth Amendment, from the papers previously submitted, the requisite showing of state action may be more difficult to ascertain. However, this Court may take judicial notice of the fact that the laws of New York State, and New York City, impose the same requirements of non-discrimination with respect to contractors, as does the federal law, and on that basis the required showing of state action is also met. In Robinson v. Price 553 F2d 918 (5th Cir., 1977), the Court ruled that a broad definition of state action is given where racial discrimination is involved.

Seventh, I do not have to plead that I have been enslaved by my employer to claim a violation of the Thirteenth Amendment. In Johnson V. Railway Express Co. 421 U.S. 459, the Supreme Court held as follows:

Congress has the power under the 13th Amendment rationally to determine what are the badges and the incidents of slavery and the authority to translate that determination into effective legislation.

It follows, necessarily, that violations of statutes enacted by authority of the Thirteenth Amendment, to the extent they define the

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badges and incidents of slavery, must also violate the 13th Amendment. It can not be disputed that acts of racial discrimination are the result of the previous condition of slavery in this country. Defendants arguments to the contrary are incorrect and irrelevant.

Eighth, Defendants correctly point out that I did not brief my argument in support of the application of 42 U.S.C. 1982. This error is corrected as follows: 42 U.S.C. 1982 applies to personal property. In Staton V. Mayers 552 F2d 908 (10th Cir., 1977), the Court held the dismissal of a school superintendent due to wilful neglect and incompetence was a denial of due process, since no determination was made by an impartial body, and the Plaintiff had a property interest in his good name and reputation. I have no less rights than the school superintendent in the above case. My job, good name, and reputation are my personal property. I had an oral contract with AT&T to provide professional services. This contract was my personal property. Federal and state law added provisions to that contract precluding discrimination. In Sims V. Order of United Commercial Travelers of America 343 FS 712 (D.C. Mass., 1972), the Court held an insurance contract constituted property under 42 U.S.C. 1982.

Ninth, E.O. 11246 implies as a matter of law, a provision of nondiscrimination in contracts between employers and employees. It also creates a contractual relationship between the federal government and its suppliers. Similar contractual requirements are imposed by the laws of New York State and New York City. One injured by discrimination is therefore a third party beneficiary of such

contracts, under the settled principles of contract law. For this reason, this Court has clear basis for exercising jurisdiction to hear Plaintiff's claim under the Executive Order , and to provide relief thereunder.

Tenth, Defendants argue that the employees of a single Corporation can not be guilty of conspiracy among themselves or between themselves and the Corporation. They reason that a corporate agent, acting within the scope of his duties, is treated as the ~~acts of one person/~~ ^{--the Corporation.} By virtue of the law cited by Defendants themselves however, if the Corporate policy is illegal, or the agents exceed the scope of their authority, then a conspiracy may exist. If this correctly states the law, there is no question that a conspiracy may exist here between AT&T and its employees. The official company policy of AT&T is against discrimination; thus, employees had to act outside the scope of their duties to discriminate. Additionally, even if the official policy was to discriminate, then the policy was illegal, and under the cases cited by Defendant, the Defendants are subject to allegations of conspiracy.

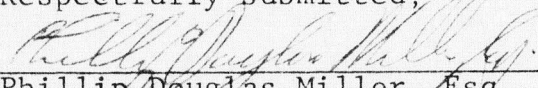
Eleventh, Defendants argue that my failure to exhaust administrative remedies denies me the right to have this Court hear my claim under 42 U.S.C. 2000e, et seq. At issue is whether I was required by law to exhaust such remedies. There is no reason to treat the issue of non-exhaustion under Title VII differently than any other statute with a similar provision, unless it is to be more liberally construed because the cancer of racism is involved.

In papers submitted to the District Court, which are a part of the Record before this Court, I addressed myself at length to the facts upon which I alleged the right to avoid the exhaustion of remedies before an agency. The District Court erred in not giving proper weight to these facts. It is well settled that a Plaintiff seeking relief is not bound to go to an agency when it is futile to do so.

The significant points raised by Defendants Brief having been addressed, Plaintiff's Reply Brief is hereby concluded with the request that the relief requested by Plaintiff be granted in all respects to the extent this Court determines that the facts, the law, and the principles of justice so require.

Dated: July 29, 1977

Respectfully submitted,


Phillip Douglas Miller, Esq.,
Attorney and Plaintiff Pro Se

